

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 235 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME TAX

Versus

ATUL PRODUCTS LTD

Appearance:

MR B.B. NAYAK for Petitioner

MR M.J. SHAH For MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and

MR.JUSTICE A.R.DAVE

Date of decision: 24/12/97

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The Revenue had suggested the following question for our consideration under Section 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") and the statement of case was accordingly called for.

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal erred in law in holding that all the issues determined by the ITO under Section 154 of the I.T Act, 1961 were of highly debatable nature and it cannot be said that the action of the I.T.O who originally framed the assessment was bad as it contained mistake apparent from record?"

The relevant Assessment Year is 1971-72.

The original assessment under Section 143(3) of the Act was made on 30.11.1973. Thereafter, the ITO sent a letter dated 6th August, 1976 to the assessee, stating that during the calendar year 1970, the assessee was granted depreciation on additions instead of restricting it to the proportionate amount based on the number of days the additions to the machineries were used in that year. According to the ITO, on several machineries installed in the later half of the year, excess extra shift allowance was allowed as against the correct extra shift allowance admissible in proportion to the days for which the machineries were used. The ITO considered this as a mistake apparent from the record, which he proposed to rectify.

By another letter dated 21st June, 1975, the ITO observed that the Naphthalene Intermediates Expansion Plant ("NI Plant" for short) established in year 1970 by the assessee was an expansion of the existing NI Plant, which was established in 1965. As the net effect was a loss of Rs. 10,09,816/-, deductions under Section 80J was wrongly allowed in the assessment. The ITO therefore, proposed to withdraw the relief under Section 80J granted in the original assessment.

The ITO, after considering the assessee's objections, by his order dated 26.11.1977 made under Section 154 of the said Act, withdrew the extra shift allowance of Rs. 1,89,528/- granted in respect of some of the plant and machinery and also withdrew the benefit under Section 80J holding that the N.I Expansion Plant was not a separate industrial unit. The assessee appealed against the ITO's order and the CIT (Appeals) disagreed with the assessee on the question of number of days to be taken into consideration for calculating the period for which the concern had worked extra shift at the relevant time. He also disagreed with the assessee's interpretation of the expression "concern" as equated with "factory". On the question of deduction under Section 80J, the appellate authority held that the

assessee was entitled to relief in respect of NI expansion plant and the deficiency incurred in respect of it, was to be carried forward rather than the loss set off against the profit from the NI old unit for the purpose. On the question whether NI expansion plant was just an expansion of the old plant or it constituted a different undertaking, it was held that this was a debatable issue and therefore, the benefit could not have been withdrawn under the provisions of Section 154 of the Act. Against the order of the CIT (Appeals), the assessee approached the Tribunal challenging the order to the extent that the appellate authority held that the ITO was justified in applying Section 154 of the Act for the purpose of revising extra shift depreciation allowance. The Revenue appealed against the order of the CIT (Appeals) in not allowing withdrawal of deduction under Section 80J of the Act.

The Tribunal after considering the rival contentions held that the issue was highly debatable as regards the fact whether the assessee - company was to be treated as one concern or that it was to be split into separate components (in view of separate factories) for the purpose of grant of extra shift allowance. In respect of the reliefs under Section 80J, it was noted that the assessee had furnished certificate during the proceedings that new plant was a separate unit altogether. From the record it found that it could not be held that when the ITO passed the original order, he had committed any mistake apparent on the face of the record. It was held that the matter was highly debatable on both the counts warranting no action under Section 154 of the Act.

It was strongly contended by the learned Counsel appearing for the Revenue that the expression "concern" was synonymous with the assessee - company and all the units of the assessee - company should be functioning extra shifts on a particular day to become eligible for the extra shift allowance for such day. It was also submitted that from the very fact that the assessee described the NI unit set up in 1970 as an expansion unit, it could not be treated as an independent unit and therefore, relief under Section 80J was rightly withdrawn by the I.T.O in the process of rectification.

The deduction under Section 80J were provided for in respect of profits and gains from a newly established undertaking. The material on record disclosed that the NI expansion plant of the assessee was started under a

fresh licence for manufacturing a distinct marketable product 'procion' which was not earlier manufactured and that a separate building and machinery were set up for the same for which an investment of Rs. 1.13 crores was made. If on the basis of such facts the original assessing authority took the view that a new industrial undertaking was set up within the meaning of Section 80J, it cannot be said that any error apparent on the face of the record was committed by the Assessing Officer so as to invoke the rectification power under Section 154.

The question as to whether the concern - worked as a whole, was argued at a great length. The Revenue side contended that all the independent units of the company which was a 'concern' should be functioning to become entitled to the extra shift allowance and relied the decision of the Supreme Court in South India Viscose Limited Vs. CIT, reported in 227 ITR 286 in that regard.

The extra shift depreciation was allowed in respect of the machinery of the various units of the assessee by the Assessing Officer who made the original assessment. The rectification was ordered on this count on the ground that all these separate units of the assessee constituted components of the concern Atul Products Ltd. as a whole and therefore, the extra shift depreciation for double and triple shifts should be in proportion to the number of days the Atul Products Ltd. had worked as a whole.

The depreciation allowance is to be calculated at the rates specified in Appendix I to the Income Tax Rules, 1962 as provided by Rule 5. The Appendix I provides for the rates for extra shift depreciation allowance in respect of machinery and plant and the calculation of the extra allowance for double shift working and for triple shift working is to be made separately in the proportion which the number of days for which the concern worked double shift or triple shift, as the case may be, bears to the normal number of working days during the previous year. Such normal number of working days shall be deemed to be, in case of a factory or concern other than a seasonal one, the actual working days or 240 days whichever was greater. The expression 'factory or concern' in this provision of Appendix I would indicate that the working of each factory or concern of the assessee is to be separately considered. There is no room for construing this provision so as to mean that if the assessee has several factories which are separate and independent units, only the working days

when all the separate units have worked should alone be computed as the actual working days, as sought to be suggested by the Revenue. The question whether a factory or concern works as a whole or not cannot be linked with the working of another independent factory. Where the assessee has more than one factory, each factory's such working days are to be separately computed to work out extra shift depreciation allowance in respect of the machinery and plant of that factory.

The Supreme Court in South India Viscose Ltd. (supra) held that extra shift allowance was not to be calculated on the basis of number of days that a particular item or machinery or plant had worked double shift or triple shift, but it was to be calculated on the basis of number of days during which the concern had actually worked double shift or triple shift. It was held that the provisions postulate that such allowance would be allowable when the concern works double shift or triple shift, as a whole in the extra shift and that it cannot be said that when a small item of machinery in a corner of a huge factory has worked extra shift, the concern as such has worked extra shift. Reference was made to the instructions of the CBDT that the grant of extra shift allowance of plant and machinery be calculated with reference to the working of a factory situated at a place and not with reference to the number of days each machinery or plant actually worked extra shift. It was also stated in those directions that when a concern had more than one factory, the extra shift allowances would be regulated for each factory in the said manner. We are unable to spell-out from this decision of the Hon'ble Supreme Court that if a company which is an assessee has several independent factories, all those separate units should be working together to enable the assessee to claim extra shift allowance. The expression "concern" or "factory" in the said decision has obvious reference to an independent unit and not to all the independent units of the assessee company. In the instant case, the Revenue was concerned with several independent industrial units of the assessee enumerated in the rectification order. The extra shift allowance was to be calculated on the basis of the number of days during which an independent factory as a whole had actually worked double shift or triple shift and the allowance was not required to be calculated on the basis of the number of days a particular item of machinery or plant had worked double shift or triple shift.

In view of the above position, we are in complete agreement with the finding of the Tribunal that there was

no justification for the ITO to exercise his powers under Section 154 for rectifying the earlier order. It is obvious that both the issues were highly debatable and it can never be said that the ITO who had passed the order originally had committed any error apparent on the face of the record warranting rectification proceedings under Section 154. The question referred to us is therefore, answered in the negative in favour of the assessee and against the Revenue. The reference stands disposed of accordingly with no order as to costs.

*/Mohandas